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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 299

JEANICE STRATTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Pet. 17-25) are reported at 232 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals (Pet. 27) was entered on May 8, 1956. The petition for a writ of certiorari was filed on August 4, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence in this case, viewed in the light most favorable to petitioner, was such that a reasonable

jury could find that the insured did not intend to deceive when he knowingly submitted false answers to material questions in his application for reinstatement of his National Service Life Insurance policy.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the National Service Life Insurance Act of 1940 (54 Stat. 1008, *et seq.*, 38 U.S.C. 801, *et seq.*) and of the Veterans Administration regulations (38 C.F.R. 8.23 and 8.25, and 38 C.F.R., 1955 Supp., 8.22 and 8.24) are set forth in the Appendix, *infra*, pp. 16-17.

STATEMENT

Petitioner brought this action under the provisions of 38 U.S.C. 817 to recover the proceeds of a policy of National Service Life Insurance. Petitioner is the widow of the insured and the designated beneficiary under the policy.

The policy was issued to Kenneth Bennett Stratton on May 1, 1942 (R. 8), and was in effect until it lapsed due to Stratton's failure to pay the premium due on December 1, 1951 (R. 9, 25). On January 8, 1952, subsequent to the expiration of the thirty-one day grace period, the insured tendered a remittance of $14.60, representing two monthly premiums for the months of December 1951 and January 1952 (R. 9, 25). The Veterans Administration informed the insured by letter of January 15, 1952 (Defendant's Exhibit No. 2, R. 73) that the remittance, having been tendered after the expiration of the grace period, could not be applied as payment of the premium due December 1, 1951, but that it could be so applied "provided you were in as good health on the date of tender [*i.e.*, January 8, 1952] as you were on the due date of the premium." Strat-

ton was advised to complete and return the Statement of Health form printed on the reverse side of the letter "[i]n order that a determination may be made with respect to this matter * * *."

On January 17, 1952, Stratton executed and signed the Statement of Health (R. 25). This consisted of two questions, both to be answered "yes" or "no," preceded by a certification reading as follows (Defendant's Exhibit No. 2, R. 73):

STATEMENT OF HEALTH

AS A CONDITION TO THE REINSTATEMENT OF THIS INSURANCE, I CERTIFY THAT THE ANSWERS TO THE FOLLOWING QUESTIONS ARE COMPLETE AND TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT STATEMENTS MADE BY ME IN THIS APPLICATION ARE RELIED UPON IN REINSTATING INSURANCE; THAT ANY DECEPTION OR FALSE STATEMENT EITHER BY INFERENCE, OMISSION, OR OTHERWISE MAY RESULT IN CANCELLATION OF THE INSURANCE OR IN REFUSAL TO PAY A CLAIM ON THE POLICY; THAT IN EITHER EVENT PREMIUMS ARE NOT RETURNABLE

The first question read:

> 1. Were you in as good health on the date of tender shown on the face of this letter as you were on the due date of the premium in default?

The insured answered "Yes" to this question. The second question read:

> 2. Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since the due date of the premium in default [*sic*]?

(If answer is "yes", give all dates and full particulars, and attach, if readily available, a certificate of the practitioner or hospital where treated, with diagnosis, prognosis and treatment.)

No dates or particulars were set forth in the space provided. The insured answered "No" to this question. [1]

Upon receipt of this form the Veterans Administration reinstated the policy, which was thereafter kept in force until the death of the insured on February 9, 1953.

It was not until over a year later, when the plaintiff filed her claim for the proceeds of the policy and the files of the insured veteran were consolidated, that the Insurance Service of the Veterans Administration became aware of Stratton's true medical history between December 1, 1951, the date on which the policy lapsed, and January 17, 1952, the date on which the insured signed the Statement of Health (R. 11). As viewed most favorably to petitioner, the facts were as follows: [2]

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[1] It has been the Government's position throughout this case that Stratton's answers to both Question No. 1, which calls for the expression of an opinion, and Question No. 2, which calls for a statement of fact, were fraudulent as a matter of law. Nevertheless, in view of the fact that proof of a fraudulent answer to either question serves to vitiate the policy and to sustain the decision of the Court of Appeals, we shall, for the purpose of brevity, confine our statement of the facts and our argument to a consideration of the evidence which pertains to the fraudulent nature of the answer to Question No. 2. It will be noted that this approach differs from that of petitioner, who largely ignores Question No. 2 and directs her argument primarily to matters which are relevant only to the question of the insured's belief as to the state of his health.

[2] The facts were set forth in stipulations (R. 25, 28), documentary evidence (R. 69-75) and the testimony of witnesses (R. 14-60).

Kenneth Stratton was in apparent good health until January 7, 1952, the day before he tendered the overdue premiums (R. 18, 19, 55-57). On that date he suffered a complete blackout or loss of consciousness for at least thirty minutes (R. 29). He was taken to the Gladewater Municipal Hospital, Gladewater, Texas, where he was admitted in an unconscious state (R. 29). At the time of his admission or shortly thereafter he vomited blood (R. 31, 32). Dr. Eichenlaub of the hospital staff immediately began treatment in an attempt both to restore consciousness and to diagnosis the cause of the blackout (R. 29). Stratton's blood sugar and blood calcium were tested while he was still unconscious in order to determine whether hypoglycemia (blood sugar deficiency) or hypocalcemia (blood calcium deficiency) might be the cause of his condition (R. 29-32). He "finally regained consciousness" (R. 30).

Stratton was kept in the hospital for four days, through January 10, 1952, in order to complete the studies being made of the possible cause of the blackout and for further treatment (R. 28, 37). The latter included treatment for the stomach condition and for soreness in the back, which Stratton believed to have been injured in his fall when he lost consciousness (R. 37). On January 8th, the day after the blackout, his condition was "much improved" and he was able to have bathroom privileges (R. 33, 37).

This was the day on which Stratton tendered his remittance to the Veterans Administration (R. 9, 25).

The only definite diagnosis reached by the medical

The only directly contradictory evidence at the trial related to a secondary issue, namely, whether it is medically possible for vomiting of blood to be induced by biting of the tongue. See p. 6, *infra*.

staff of the hospital was with reference to the apparent bleeding from the stomach (R. 35), which was diagnosed as a bleeding peptic ulcer (R. 31, 32). Stratton had bitten his tongue during his seizure (R. 19), and there was conflicting testimony at the trial as to whether it was medically possible for the vomiting of blood (hematemesis) to have been caused by the tongue biting rather than by a peptic ulcer or other internal condition (R. 32, 33, 38, 49, 50).[3]

No definite diagnosis of the cause of the insured's unconsciousness was reached by the hospital staff since, of the possible causes under consideration, only hypoglycemia and hypocalcemia could be tested for at the hospital and the results of these tests were negative (R. 29-31). The possibility of epilepsy or other brain involvement could not be eliminated without an electroencephalographic tracing, for which the hospital lacked the necessary equipment (R. 30-37). Dr. Eichenlaub therefore wrote to Dr. Schwenkenberg, a neuropsychiatrist in Dallas, on or about January 10 or 11, 1952, requesting an appointment for Stratton for an electroencephalographic examination (R. 22, 37). An appointment was arranged for January 18, 1952 (R. 28).

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[3] The record does not disclose whether the diagnosis of bleeding peptic ulcer was communicated to Stratton, showing only that he was treated for an ulcer (R. 35) and was given medication for his stomach condition through January 17th, the date on which he signed and submitted the Statement of Health. On January 18th Stratton "was seen relative to his stomach * * * [a]nd at that time the medication which had been given him for his stomach was causing a regurgitation, he wasn't passing his food into his intestinal tract, so the medication was stopped" (R. 33). An X-ray examination of undisclosed date indicated a crater in the lining of Stratton's stomach which "might or might not have been an ulcer" (R. 35).

Petitioner testified that on Stratton's discharge from the hospital on January 10th he was weak but apparently normal (R. 20). She stated that his condition was good on January 17th (R. 21), the date on which he signed the application for reinstatement and the day before the electroencephalogram appointment, and that prior to that time the doctors had "said they didn't find anything wrong but the possibility must be explored, so actually we weren't too apprehensive about [the impending electroencephalogram] because he had already had other tests" (R. 23).

Dr. Bloom of the hospital staff testified that Dr. Eichenlaub had informed Stratton of the electroencephalogram appointment, advising him that, while the tests to determine the cause of the blackout were thus far negative and they "had found nothing" (R. 36, 37), the examination was not yet complete, and that without the electroencephalogram the cause of the blackout was still undetermined (R. 37). It was stipulated that Dr. Eichenlaub, if present, would testify that he had " '* * * told [Stratton] that it could get serious' or 'It couldn't be serious'—in other words, it was for further observation" (R. 28).

It was against this factual background that the insured, on January 17, 1952, a week after his release from the hospital, certified that he was (1) in as good health on January 8, 1952, the day he had tendered the premiums and the day following his seizure, as he had been on December 1, 1951, the day his defaulted premium was due; and (2) that he had not been ill, had not been prevented from working by reason of illness, and had not consulted a physician or been hospitalized since December 1, 1951. This certification was received in the Veterans Administration office on January 18,

1952, and approved on the same day (R. 73). According to the regular procedure of the Veterans Administration, as testified to by Dr. Frederick J. Burt, Chief Medical Consultant for the Underwriting Division of the Veterans Administration Denver District Office, if the questions contained in the Statement of Health are answered as Stratton here answered them, "Yes" to Question No. 1 and "No" to Question No. 2, immediate administrative approval is accorded the application by a premium review clerk, with no necessity for approval by a medical officer (R. 40-42). The evidence indicates that this was done in this case (R. 73).

Dr. Burt further testified that Stratton's application for reinstatement would have been initially rejected if the Veterans Administration had been informed of, or been given reason to inform itself of, any one of the following facts: the hospitalization nine days prior to the submission of the application and on the very date of tender of the overdue premiums (R. 44, 45), the history of vomiting of blood (R. 45), the diagnosis of bleeding peptic ulcer (R. 45-47), the unexplained blackout (R. 45, 48), or the scheduled electroencephalographic examination (R. 43, 44).

On February 7, 1953, Stratton suffered a second blackout and died two days later in the Veterans Administration Hospital, McKinney, Texas (R. 16, 59). The primary cause of death was determined by autopsy to be a brain tumor (Defendant's Exhibit No. 3, R. 75).[4] Petitioner's subsequent claim for the proceeds of the insurance policy was denied on the ground that

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[4] The electroencephalographic tracing of January 18, 1952, was negative, but there are apparently some cases of brain tumor which an electroencephalogram fails to reveal (R. 37, 38).

the reinstatement of the policy had been procured by fraud (R. 11). This suit followed.

The case was heard before a jury. At the close of the evidence the Government moved for a directed verdict on the ground that the evidence raised no controverted issues of fact and showed as a matter of law that the insured had procured the reinstatement of the policy by fraud (R. 60, 61). The motion was denied and the case was submitted to the jury (R. 61), which returned a general verdict for the petitioner (R. 78). The Government then filed a Motion for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial (R. 78, 79). On June 1, 1955, the court denied this motion and entered judgment on the verdict in favor of petitioner in the amount of $10,000 (R. 81-83). On appeal, the Court of Appeals, ruling that the evidence compelled the conclusion that Stratton could not have given the false answers he did without intending to defraud, and that no jury could have reasonably found that he did not so intend, reversed the judgment of the district court and rendered judgment for the respondent, Cameron, J., dissenting (Pet. 17-25).

ARGUMENT

On the conclusive demonstration supplied by the record in this case, the Court of Appeals was clearly correct in holding that reasonable men could not differ as to whether the insured intended to deceive when he knowingly submitted false answers to material questions in his application for reinstatement. In so ruling, the Court of Appeals, relying upon the well settled principles of law in this area enunciated in *Pence* v. *United States*, 316 U. S. 332, exercised its judicial func-

tion of deciding whether the evidence, viewed in the light most favorable to petitioner, presented an issue of fact for the jury or one of law for the court. The result is squarely in accord with the *Pence* decision, and there is no occasion for further review by this Court.

In asserting the defense of fraud, the burden was upon the Government to prove all the necessary elements of fraud. As recalled in *Pence*, at 338, these are:

> * * * (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation.

While the failure to prove any one of these elements results in a failure of the defense of fraud, where all have been established by the necessary quantum of proof the Government is entitled, as the *Pence* case demonstrates, to a directed verdict in its favor.

Petitioner contests neither the falsity of the representations made by the insured in submitting the Statement of Health, the insured's knowledge of such falsity, the materiality of the representations, nor the Veterans Administration's reliance thereon, all of which were proven by uncontradicted evidence. The petition instead raises solely the question (Pet. 3) whether "* * * reasonable men could have differed as to the existence or non-existence of the alleged fraudulent intent."

The documentary evidence (R. 73) reveals that Stratton signed the Statement of Health on January 17, 1952. This Statement required only that Stratton answer two "clear and simple questions" (*McDaniel* v.

United States, 196 F. 2d 291, 294 (C.A. 5); *Clohesy* v. *United States*, 199 F. 2d 475, 478 (C.A. 7)), relating to a period of less than seven weeks. In signing his name below the answers, Stratton certified that the answers given were "complete and true to the best of [his] knowledge and belief", and that he understood that his statements were to be relied upon in reinstating the policy and that "any deception or false statement either by inference, omission, or otherwise [might] result in cancellation of the insurance or in refusal to pay a claim on the policy" (R. 73). In answering "No" to Question 2, Stratton certified that since December 1, 1951, the due date of the premium in default, he had not been ill, had not suffered or contracted any disease, injury, or infirmity, had not been prevented by reason thereof from attending his usual occupation, and had not consulted a physician, surgeon, or other practitioner for medical advice or treatments at home, hospital, or elsewhere, in regard to his health.

Every one of these certifications was, of course, undisputedly false. Between December 1, 1951, and January 17, 1952, Stratton had suffered the thirty-minute blackout; had vomited blood; had complained of a sore back; had spent four days in a hospital; had undergone numerous medical tests; had been treated by at least two doctors for his several complaints; had been notified of an appointment to see a third doctor the day following his certification; and had presumably missed several days' work. All of these occurrences had taken place within ten days before he signed the certification. And prior to the date he signed the Statement, Stratton had been informed that he would have to travel the following day from Gladewater to Dallas, a distance

of some 110 miles each way,[5] for the electroencephalographic examination. Finally, it is not disputed that Stratton had permitted his policy to lapse while he was still in good health, and that he made no effort to procure its reinstatement until after he had suffered his seizure on January 7, 1952. On the very next day, January 8th, while confined to a hospital room, he tendered the over-due premiums.

On the basis of these objective facts, the petitioner asserts that reasonable men could differ as to whether Stratton intended to deceive the Veterans Administration when he denied that he had been sick or hospitalized or had seen a doctor, and urges that the contrary conclusion of the court below requires further review and reversal here. The argument is not only refuted by the record, but is virtually foreclosed by the governing principles set forth in the closely analogous case of *Pence* v. *United States*, 316 U. S. 332. Like this case, *Pence* was a suit by the beneficiary of a Government life insurance policy. In that case, as here, the Government, after defending the beneficiary's suit on the ground of fraudulent reinstatement, moved for a directed verdict. As here, both this motion and the Government's subsequent motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, were denied and judgment was entered on a general verdict for the plaintiff. The Court of Appeals for the Seventh Circuit reversed and remanded, holding that, on the evidence, the Government was entitled to a directed verdict. 121 F.2d 804. This Court affirmed the judgment of the Court of Appeals. As recited by this Court, the evidence there revealed that

[5] *Rand McNally Commercial Atlas and Marketing Guide*, 83d ed., 1952, p. 403.

in his application for reinstatement the insured had denied, among other things, that he had been ill or prevented by ill health from attending to his usual occupation (316 U. S. at 334). The evidence nevertheless convinced the Court that there was

> * * * no room for conjecture as to the falsity of the previous statements in the application, and of his knowledge of such falsity. *From these facts the requisite intent to defraud is presumed, and therefore need not be proven in the absence of countervailing evidence.* Materiality and reliance were conclusively established by evidence introduced at the trial, if indeed such proof were needed. [316 U. S. at 339; emphasis added.]

The Court then held that a directed verdict in favor of the Government was required.

As in *Pence*, the rule that, given the other elements of fraud, intent may be presumed has been universally followed by the various courts of appeals in cases involving government life insurance. See, *e.g.*, *Meadors* v. *United States*, 219 F.2d 438 (C.A. 6), affirming 118 F.Supp. 277; *Danaher* v. *United States*, 184 F.2d 673 (C.A. 8); *United States* v. *Depew*, 100 F.2d 725 (C.A. 10); *Raives* v. *Raives*, 54 F.2d 267 (C.A. 2). That principle was correctly applied by the Court of Appeals in this case.

Petitioner, while admitting the validity of the principle, attempts to distinguish this case from the *Pence* case, asserting that the court below "* * * ignores the existence of *countervailing* evidence, which this Court said was absent in the *Pence* case * * *" (Pet. 9; emphasis in the original). In support of this contention, the petition cites evidence that the insured's "general health

was good" during the thirteen months of his life *after* the signing of the Statement of Health; petitioner's testimony that, in her opinion, the insured's "condition was good" on the date of signing; and the fact that the doctors had told Stratton, in advising him of the appointment for an electroencephalogram, that they had as yet found nothing wrong with him that would explain the blackout (Pet. 9-10).

Such evidence is, of course, irrelevant to the question of Stratton's intent in answering a question which, unlike Question No. 1, was wholly unrelated to his own subjective opinion of the state of his health. The context of Question No. 2 made it plain beyond the possibility of misunderstanding that it was for the Veterans Administration—not the insured—to decide the significance of any illnesses, treatments or hospitalizations which had intervened since the lapse of the policy. The question called for a factual statement, and, in the event of an affirmative answer, for "* * * all dates and full particulars, and * * *, if readily available, a certificate of the practitioner or hospital where treated, with diagnosis, prognosis and treatment" (R. 73). In answering this question, what Stratton may have thought about his general health is completely immaterial. See *Danaher* v. *United States*, 184 F.2d 673, 676 (C.A. 8). Petitioner's allegedly "countervailing" evidence consequently does not detract from the overwhelming evidence of a conscious design to procure the reinstatement of the lapsed policy by fraudulent misrepresentations. The courts have repeatedly recognized that in cases where the evidence is such that, in the light of human experience, no reasonable man could find that the insured had not intended to deceive, it is their duty to withhold this ques-

tion from the jury and decide it as a matter of law. *Pence* v. *United States*, *supra*; *Meadors* v. *United States*, 219 F. 2d 438 (C.A. 6); *Danaher* v. *United States*, 184 F. 2d 673 (C.A. 8); *McDaniel* v. *United States*, 196 F. 2d 291 (C.A. 5); *United States* v. *Elliott*, 73 F. 2d 374 (C.A. 5), certiorari denied, 295 U. S. 740. Few if any of the foregoing cases presented the pattern of deliberate fraud which was shown here. Correctly applying the familiar principles called for by this showing, the decision below presents no basis for certiorari.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition should be denied.

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AUGUST, 1956.

APPENDIX

1. In pertinent part, the National Service Life Insurance Act of 1940 (54 Stat. 1008, *et seq.*, 38 U.S.C. 801, *et seq.*) provides as follows (as codified):

> § 802. * * *
>
> (w) *Incontestability of policies.* Subject to the provisions of section 812 of this title, all contracts or policies of insurance before or after August 1, 1946 issued, reinstated, or converted shall be incontestible from the date of issue, reinstatement, or conversion except for fraud, non-payment of premium, or on the ground that the applicant was not a member of the military or naval forces of the United States.

2. The applicable Veterans Administration regulations, set forth in 38 C.F.R. 8.23 and 8.25, and in 38 C.F.R., 1955 Supp., 8.22 and 8.24, read in pertinent part as follows:

> Section 8.22. *Reinstatement of National Service life insurance*—(a) * * * any insurance which has lapsed * * * may be reinstated upon written application signed by the applicant * * * provided such applicant at the time of application and tender of premiums is in the required state of health as shown in § 8.23(a) * * * and submits evidence thereof at the time of application and tender of premiums as may be satisfactory to the Administrator of Veterans' Affairs * * *.
>
> Section 8.23. *Health requirements.* National Service life insurance * * * may be reinstated * * * (a) * * * provided the applicant be in as good health on the date of application and tender of pre-

miums as he was on the due date of the premium in default and furnishes evidence thereof satisfactory to the Administrator.

Section 8.24. *Application and medical evidence.* The applicant for reinstatement of National Service life insurance, during his lifetime and before becoming totally disabled, must submit a written application signed by him and furnish evidence of health as required in § 8.23 at the time of application satisfactory to the Administrator of Veterans Affairs and upon such forms as the Administrator shall prescribe or otherwise as he shall require. Applicant's own statement of comparative health may be accepted as proof of insurability for the purpose of reinstatement under § 8.23(a), but, whenever deemed necessary in any such case by the Administrator, report of physical examination may be required.

Section 8.25. *Reinstatement in the month following date of lapse.* Where a premium on National Service life insurance is not paid within the grace period but is tendered not more than 15 days after the date of expiration of the grace period, such premium may be regularly applied as premium for the unpaid month, provided the insured at the time of tendering the delayed premium is in as good health as he was on the due date of the premium in default and furnishes a statement to that effect not more than 31 days after the date such delayed premium was tendered.

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